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Article 9 Water Framework Directive: What does the term “water services” mean?

**On the EU Court of Justice conclusions
of Advocate General Jääskinen in case C-525/12**

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On the EU Court of Justice conclusions of Advocate General Jääskinen in case C-525/12

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The conclusions of Advocate General Jääskinen in the matter of the infringement proceedings against Germany, regarding the scope of the term “water services” in Article 9 of the Water Framework Directive, are now available. In these he considers that the action brought by the Commission against the narrow interpretation in Germany, which is restricted to water supply and waste water disposal, is inadmissible due to the fact that there is no complaint in respect of any clearly defined conduct that would constitute an infringement; in the alternative he materially agrees in full with the position put forward by Germany. However, this paper argues that the AG’s main arguments in favour of a strict interpretation are misleading.

I. Background information and current status of the proceedings

In Article 9 of the Water Framework Directive the European legislator requires member states to “take account” of the “principle of recovery of the costs [...] including environmental and resource costs” where “water services” are concerned (paragraph 1, 1st bullet point). At the same time member states are particularly instructed to “ensure” that the “water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive” (paragraph 1, 2nd bullet point). Finally, “in doing so”, i.e. when complying with their obligations arising from bullet points 1 and 2, the member states can “have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region affected” (paragraph 1, 3rd bullet point).

In its specifications Article 9 differentiates between “water services”, and the more widely defined “water uses”, which include water services. Article 2 (38) defines water services as “all services which provide, for households, public institutions or any economic activity: (a)

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abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, (b) waste-water collection and treatment facilities which subsequently discharge into surface water". According to Article 2 (39) water use means "water services together with any other activity identified under Article 5 and Annex II having a significant impact on the status of water".

It is not easy to ascertain exactly what the member states are meant to be obligated to do by Article 9 (1) of the Water Framework Directive.¹ This standard is characterised by laborious compromises during the legislative procedure² and is studded with terms that require interpretation, and about the interpretation of which there is disagreement both in literature and between the Commission and member states. At the heart of the present infringement proceedings against Germany³ lies the definition of the concept of water services, and thus the scope of the principle of recovery of costs as arising from Article 9 (1) of the Water Framework Directive. While the view taken by Germany as well as by the member states Austria, Sweden, Finland, Hungary, UK, and Denmark, which have joined the action as Interveners, is that water services as per Article 2 (28) of the Water Framework Directive merely refers to water supply and waste water disposal as provided by independent service providers,⁴ the Commission interprets this more widely, to also include the "impoundment for the purpose of generating electricity from water, shipping and flood control, abstraction for irrigation and industrial purposes, as well as own use"⁵. It is asserted, that any implementation of the Water Frame-

¹ *Unnerstall*, Ökonomische Elemente in der WRRL und ihre Umsetzung [Economic elements in the Water Framework Directive and their implementation] in: Lauterbach et al, Handbuch zu den ökonomischen Anforderungen der europäischen Gewässerpolitik [Handbook for the economic requirements of the European water policy], 2012, p. 103, understandably comments that despite extensive efforts on his part, it is hardly possible to fully clarify the content of the provisions of Article 9 (1) of the Water Framework Directive.

² As far as the genesis of the Water Framework Directive is concerned, as well as the disagreement regarding the definition of the recover in Article 9, see *Brockmann*, Die Handlungsfähigkeit der Europäischen Union – untersucht am Beispiel der EU-WRRL [The European Union's capacity to act – examined using the example of the EU Water Framework Directive], 2003; *Unnerstall*, Zeitschrift für Europäisches Umwelt- und Planungsrecht (EurUP) 2006, 29; *idem*, Journal of Environmental Law and Policy (ZfU) 2006, 449; as well as *Kaika/Page*, European Environment 2003, 314.

³ Case C-525/12.

⁴ This also appears to be the prevailing opinion, albeit with different assessments of own use – see in this respect *Kolcu*, Der Kostendeckungsgrundsatz für Wasserdienstleistungen nach Art. 9 WRRL [The principle of recovery of costs for water services pursuant to Article 9 of the Water Framework Directive], 2008, p. 57; *Desens*, Wasserpreisgestaltung nach Artikel 9 EG-WRRL [Pricing water pursuant to Article 9 EC- Water Framework Directive], 2008, p. 148 f.; *Gawel/Köck* et al., Weiterentwicklung von Abwasserabgabe und Wasserentnahmeentgelten zu einer umfassenden Wassernutzungsabgabe [Developing charges for waste water discharge and water abstraction further into a comprehensive water use charge], 2011, p. 42 ff.; *Durner/Waldhoff*, Rechtsprobleme einer Einführung bundesrechtlicher Wassernutzungsabgaben [The legal difficulties in introducing water use charges at a federal law level], 2013, p. 29 ff.; *Reese*, JEEPL 2013, 355, 361 ff.

⁵ Application of the Commission, cited as per the conclusions of the Advocate General Niilo Jääskinen, dated 22 May 2014, case C-525/12, p. I.1, <http://curia.europa.eu/juris/document/docu->

work Directive, which fails to include these services in the interpretation of water services and the recovery obligations tied to these, constitutes an infringement. In order to have the infringement established, the Commission brought an action before the ECJ on 19 November 2011.⁶

The proceedings are of principal importance, as it would enable a situation where the contentious scope of the principle of recovery of costs could be fixed in a binding manner. The government of the Federal Republic of Germany currently takes the view that it already fully satisfies the requirements of Article 9 through the principle of recovery of costs on the basis of communal charges⁷ for water supply and waste water disposal, and – in respect of environmental and resource costs – by way of federal waste water charges and water abstraction charges levied by the federal states. If the ECJ were to agree with the interpretation of the Commission, it would become necessary to at least consider recovery of costs for a number of further water uses, and to justify any deviations.

On 22 May 2014 Advocate General Jääskinen presented his conclusions in the matter.⁸ Jääskinen dismisses the action in his conclusions, as he considers that the only purpose of the action is to resolve a disagreement in respect of interpretation, but that it does not identify any specific infringement to complain about (II). In the alternative, he dismisses the action as being without merit. In so doing, he confirms the position taken by Germany in almost every aspect (III).

II. Admissibility of the Claim

The Advocate General takes the view that the statement of case of the Commission was unclear, or at least insufficiently specific, as far as a complaint about a specific infringement is concerned, and considers that a mere application for a declaratory judgment for the purposes of "interpreting" Union secondary law is not admissible.

ment.jsf?text=&docid=152659&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=574647. Similarly in literature: *Unnerstall*, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2006, 528 (529); *idem*, *Zeitschrift für Umweltrecht (ZUR)* 2009, 236; *idem*, in: *Handbuch zu den ökonomischen Anforderungen der europäischen Gewässerpolitik [Handbook for the economic requirements of the European water policy]*, 2012, p. 96 ff.; *Stangl*, in: *Umweltdachverband, Ökonomische Instrumente im Wasserschutz [Environmental Umbrella Organisation, Economic instruments in water protection]*, 2012, p. 80; *van Rijswijk/Havekes*, *European and Dutch Water Law*, 2012, p. 430 ff.; *Brackemann/Ewens/Interwies/Kraemer/Quadflieg*, *Wasser und Abfall* 2002, 38.

⁶ OJ C 26, 26.01.2013, p. 35.

⁷ For a critical view in respect of the alleged congruence with the principle of recovery of costs pursuant to Article 9 of the Water Framework Directive is concerned, see *Gawel*, *Kommunale Steuer-Zeitschrift* 2012, 1.

⁸ Conclusions of the Advocate General Jääskinen (Fn. 6)

However, it would be a pity to dismiss the action as inadmissible, as this would fail to provide the required clarity in this matter. Moreover, this would result in an immediate further action, in which the Commission could specifically complain about those cases of incomplete recovery of costs, which are already listed in the present statement of case (no water abstraction charges in three federal states, far-reaching exemptions for agriculture and mining in the laws of the remaining federal states, no noticeable efforts to ensure recovery of costs or reasons for exemptions, for shipping and hydroelectric power for example, throughout Germany) and make these the subject matter of the action. For this reason it would be preferable if the ECJ were to reach a substantive decision in the matter; in order to do so, and in order to overcome the possible lack of precision in respect of the infringements complained of, as set out in the statement of case, the Court could ascertain that precision itself by interpreting the facts as set out – which would appear to be eminently possible.

III. Merits of the action

An aspect which is of fundamental importance – also with a view to possible further proceedings – is the question of the merits of the action. The Advocate General takes the view, that in accordance with all possible methods of construction (semantics, classification, genesis and purpose of the Directive) the "only proper approach" (paragraph 5) is to apply a narrow interpretation. However, mostly there is no detailed engagement with potential counter arguments, which is surprising, given the unambiguousness of the outcome. On the contrary, the lack of clarity in the matter is frequently postulated without further ado: thus, the concept of service "necessarily" presupposes that a "service provider" must exist (paragraph 53), which is said to follow from the "common" understanding of "service". In addition to the various language versions of the Directive differing, the connotations of the terms in the official languages are not identical (the English term "service" is considerably broader than the German term "Dienstleistung"), and yet the contention is that a "common" interpretation, which would appear to have been borrowed from commerce, should be decisive. This is surprising, particularly if one considers that in other respects reference is frequently made to the fact that the use of water resources is special ("not a commercial product like any other but, rather, a heritage", as per recital 1), when the purpose is to reject the criteria of commerce in matters relating to water management. The question why "services" could not, at the same time, be "ecosystem services"⁹, particularly in view of the aims and the subject matter of the Water Framework Directive, requires a rather more detailed explanation than what was deemed necessary here. It is not without reason that in recent years it has been emphasised, that the ecosystem also provides free but valuable services for human purposes, which need to be taken into consideration when managing scarce natural resources ("ecosystem services").

⁹ See instead of many Sander/Dendoncker, *Ecosystem Services: Global Issues, Local Practices*, 2014.

The Advocate General did not deal in detail with the syntactic and semantic arguments advanced by Germany, for example in respect of the meaning of the conjunction "and" in Article 2 (38)(a), ("not useful" – paragraph 63), but nevertheless he confirms the view, that the list provided there, "abstraction, impoundment, storage, treatment and distribution of surface water or groundwater", should be interpreted to refer to the individual value-added stages of water provision only (paragraph 53), not to different water services to be provided independently of one another, despite the fact that that which is to be provided according to the wording of the legal definition can be obtained for "economic activities of all kinds". Again, detailed reasons are lacking. More as an aside, and again without an effort to provide reasons, the Advocate General picks up the argument that interpreting water services to mean more than supply and disposal would lead to a situation where the distinction between water services on the one hand and water use on the other would be eliminated (paragraph 63). However, the Directive does not indicate any requirement for a specific differentiation between the scopes of the two concepts anywhere, nor is such a requirement evident from the spirit of the matter (functionality of recovery of costs and user responsibility). Had the European legislator intended to subject only the bipolar drinking water supply and waste water disposal to the principle of recovery of costs, in such a clear and unambiguous manner, without including any own services, one has to wonder why such an unambiguous intent should have been couched in such ambiguous phrasing.

In view of the generally chaotic genesis of Article 9, the Advocate General does not refer to much more, in his historic interpretation, than to state that it follows from the report on the joint draft as approved by the Conciliation Committee, that "fixing charges for these two types of use of water was at the heart of the negotiations" (paragraph 69), which hardly provides substance for unequivocally interpreting the concept of water services. Even worse, the fact that the Council emphasises in its common position, contrary to the original concept of the Commission, "that the member states shall determine the measures which should be taken in order to apply the principle of recovery of costs, based on an economic analysis" (paragraph 68), offers precisely no help as far as the interpretation or differentiation of the concept of water services are concerned.

Apart from confirming the known arguments for a narrow interpretation (bipolar understanding of services, syntax analysis of the legal definition, difficulties of congruence between water services and water use), it is in the realm of systematic and teleological interpretation that the conclusions offer a new main reason for the action being without merit: according to this, it is claimed that a uniform approach across the board for pricing water in a manner that the costs are recovered is incompatible with decentralised management planning, regional peculiarities and the instrumental variety for implementing the Directive.

It is claimed that the Water Framework Directive pursues "a holistic approach towards water management, which excludes the possibility of an instrument of fixing charges across all

member states, irrespective of their specific ecological and hydrological features, being universally applicable" (paragraph 94) "[...] a homogenous application of the principle of fixing charges, which is erroneously based on a broad interpretation of water services within the meaning of Article 2 (38) of the Water Framework Directive, [cannot] be effective in view of not only the significant differences between the member states as far as the matter of water supply is concerned, based on geographical and climatic conditions, but also due to the fact that different water management concepts in the member states." (paragraph 92) Moreover, a broad interpretation of the concept of water services would lead to a situation where "the equilibrium between different instruments, as intended by the legislator in order to maintain the practical effectiveness of the Water Framework Directive, would be destroyed." (Paragraph 63).

This line of argument does no less than build up a straw man: one is given the impression, that member states would be "forced" to "uniformly" apply full cost recovery, and would thus no longer be able to follow their own, bespoke management concepts, or that they would be instrumentally restricted. This is absurd, not least because the first bullet point of Article 9 (1) merely posits the "principle" of recovery to be "taken into account" by the member states, and subjects this principle (as well as its more detailed specification as per the second bullet point) to a fairly broad caveat in the third bullet point, with the help of which it is possible to comprehensively take into account specific sectoral and regional features. According to this,, "in doing so", i.e. when complying with their obligations arising from bullet points 1 and 2, the member states can "have regard to the social, environmental and economic effects of the recovery of costs as well as the geographic and climatic conditions of the region affected" (paragraph 1, 3rd bullet point). This opens the way for the principle of recovery of costs being very open and flexible, and to expressly allow for specific management concepts and circumstances.

In addition to the above, it is precisely the exact manner of instrumenting the recovery of costs as per Article 9 which is left open; what is crucial, rather, is an attribution of costs to the user, which is fair to the person responsible. It is undisputed that it is possible that measures other than ones which are directly related to price can contribute to an indirect attribution of costs, such as, for example, regulatory provisions, and that those can therefore be considered a measure of "water price policy", for example in respect of environmental and resource costs.

Considering the view widely held in German literature, that it is precisely due to its vague requirements and far-reaching qualifications, that effectively Article 9 does not impose "any" obligations,¹⁰ it is somewhat surprising to suddenly find it being stylised into a powerful coercive instrument. At the same time, the hypotheses which seems to form the basis for this

¹⁰ Thus, for example, *Waldhoff*, in: Landtag North Rhine-Westphalia, APr 15/239, S. 5; and apparently similar *Reinhardt*, Natur und Recht (NuR) 2006, 737, 740, who claims to only recognise "empty words".

view, namely that responsible conduct with regard to costs in respect of dealing with resources would in some way "interfere with" regional management planning which is aimed at sustainable use and protection of waters, and at the same time could only be tolerated as an exception in the supply of water and waste water disposal, is somewhat bizarre. The whole recovery of costs arising from Article 9 is hereby stylised into some form of foreign matter, which must be tamed and tightly controlled, so as not to create any further damage (foiling bespoke concepts, wrong choice of instruments). Accordingly, it is claimed that no application that would be too far-reaching could be considered. This perspective can also be found in the finding, which again is not supported in detail, that regulatory controls of the market are "frequently more suitable" than price solutions (paragraph 91). Even if this were the case, which in certain cases is not disputed from an environmental economics perspective,¹¹ this is clearly not an argument in favour of restricting the concept of water services to local water services: neither does Article 9 exclude regulatory measures in order to allocate costs, nor does it prescribe any specific instrumental regime, nor can such recovery of costs be applied "uniformly" (paragraph 90), "homogenously" (paragraph 92) or "universally" (paragraph 94) to all member states or all river basin districts. Even if one just looks at the wording of Article 9, the exact opposite is the case!

The suggestion that the principle of recovery of costs, which is to be structured at the discretion of the member state in question, and which, moreover, is subject to the qualifications of proportionality and localisation, if it were extended to other uses than just local water services, could ever "force" an action that would be ecologically unjustifiable, and that could have serious consequences ("flooding in front of a dam, drought behind it"), which is a suggestion that is set out in all seriousness at paragraph 93, is almost impossible to comprehend. In addition to this, there are repeated attempts to marginalise quantity management in the Water Framework Directive, and to associate an extension of the concept of water services with this quantity management (e.g. paragraph 94), while at the same time characterising it as missing the main purpose of the Directive. Of course, this in itself rather misses the point of the matter, since impoundment and bank reinforcements for shipping and hydroelectric power are highly relevant as far as water ecology is concerned, and directly touch on the environmental goals set out in Article 4.¹² Even simple water abstractions are not possible without ecological and economic opportunity costs, even in "water rich" member states, and from the perspective of sustainability, these too require a precautionary management regime.¹³ Nor is there any requirement for any water resources to be "publicly owned", as the Advocate General appears to think, in order to "prescribe prices" (paragraph 90). The point of the principle of recovery of costs is not to fix rates for end-consumers, but rather to allocate the cost of any

¹¹ See *Gawel*, *Die Verwaltung* 1995, 201.

¹² *Gawel/Köck et al.* (Fn. 5), p. 261 ff.

¹³ *Gawel/Fälsch*, *gwf-Wasser/Abwasser* 2011, 838.

interferences in the water supply fully and justly to the person responsible for having caused these costs, in order to ensure that the prices for water related services can also tell the economic and ecological truth in markets.

Without any reason, the Advocate General seeks to qualify the meaning of Article 9 ("not an autonomous instrument" – paragraph 76) and comments on the "merely supplementary character of the determination of charges" (paragraph 83). This common image of recovery of costs having merely a supplementary function, has already been rejected elsewhere:¹⁴ the Water Framework Directive does not give any indication that this should be a purely instrumental function, as compared to Article 4 of the Directive, neither when one analyses the wording of Article 9 of the Water Framework Directive, nor if one interprets it systematically or teleologically. Rather, the responsibility for costs pursuant to Article 9 of the Water Framework Directive is a fundamental principle of order in a world of scarce resources, and as such it is an independent part of the framework of order established by the Water Framework Directive as a whole, as per Article 1 of the Directive. However, it is entirely unclear, both materially and in view of the utmost flexibility granted by Article 9, why the principle of responsibility for costs and user responsibility should not harmonise with the concepts of regional river basin management planning, as the conclusions repeatedly claim or insinuate.

On the whole, the remarks in relation to the merits of the action are permeated by sweeping misunderstandings as far as the content and status of Article 9 within the Water Framework Directive itself is concerned, but also in relation to the principal role that responsibility for costs in dealing with resources plays when dealing with the sustainable management of water resources. Far from responsibility for costs, which is fair to users being some foreign matter in a regional management strategy, it is an essential part thereof. Responsibility for costs limits access to resources to an extent which is economically effective, and thus eases the burden on the ecosystem, prevents an unfair shifting of the burden onto third parties or the general public, and enables the flexibility which is necessary for formative management to work. The details of how exactly such responsibility for costs will need to be implemented in their respective settings as part of a recovery concept, and the consequences that will have to be borne in mind is precisely something that is at the discretion of the member states (although there is an obligation to report). Ecological responsibility for costs may be undesirable for many from an economic, social and political perspective, but nevertheless it serves the aims of the Water Framework Directive without limitation. It is exactly Article 9 that opens up the opportunity to also work on this sensitive area, in a decentralised and proportionate manner, as far as economic, social and ecological effects are concerned. Consequently, a restrictive interpretation of the concept of water services is entirely unnecessary.

¹⁴ See in this respect *Gawel/Unnerstall*, *Deutsches Verwaltungsblatt (DVBl)* 2014, 963.

Therefore, in order to define the term of “water services”, which, on the whole, is rather indistinct, one should avoid the temptation to denigrate the principle of recovery of costs and the price mechanisms for its implementation as marginal, and even problematic, interfering objects, which need to be limited, in which pursuit it might just about be tolerable to strictly restrict these to a few exceptional areas. Just recently the German state of Saxony incorporated hydroelectric power into its water abstraction charges,¹⁵ and has thereby managed to demonstrate that pricing hydroelectric energy, pursuant to Article 9 of the Water Framework Directive poses neither a risk for the German energy transition towards renewables, the so-called *Energiewende*, nor does it unleash a problematic, coercive instrument, which would now impose an obligation on other German states or EU member states, to follow that particular management assessment. On the contrary, this instrument can serve to allow the market to separate out power stations which are economically inefficient, as they are highly significant from a water ecology perspective, and which do not make a significant contribution to the electricity supply provided by renewables. Anyone who does not want this can take a different approach or claim an exemption as per the third indent of Article 9 (1).

IV. Conclusion

One can only hope that the ECJ does not follow the assessment in respect of the admissibility of the action. If that were the case, it would mean that the urgently needed clarification in the dispute regarding the definition of water services would merely be needlessly postponed. As far as the material grounds are concerned, it is no doubt possible to support either position with respectable arguments.¹⁶ However, the Advocate General's reasons for asserting that the factual situation is clear and straightforward, are not even remotely convincing and cause further irritation by stylising Article 9 into being a coercive instrument which would be incompatible with decentralised river basin management. It would be fatal if the ECJ were to follow this reasoning in particular, as this reasoning would lend itself to needlessly discrediting recovery of costs as such as part of a management strategy.

¹⁵ See in this respect *Gawel*, *Sächsische Verwaltungsblätter* (SächsVBl.) 2013, 153; *Dammert/Brückner*, *Landes- und Kommunalverwaltung* (LKV) 2013, 193.

¹⁶ See *Gawel/Köck*, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 2014, 1212.